No. 93-601

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

MOYER PACKING COMPANY and DARLING-DELAWARE COMPANY, INC.,

Petitioners,

vs.

PETRUZZI'S INC. (formerly known as Petruzzi's IGA Supermarkets, Inc.),

Respondent.

Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent[1] respectfully files this brief to set forth reasons why the petition for a writ of certiorari should not issue pursuant to Supreme Court Rule 10.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit" or "Court of Appeals") is set forth in petitioners' Appendix at pages A1-46. There were some minor corrections to the original opinion and the complete opinion is reported as *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company Inc., et al.*, 998 F.2d 1224

1. Pursuant to Supreme Court Rule 29.1, respondent corporation states that it has no corporate parent or subsidiaries.

(3d Cir. 1993). The opinion of the United States District Court for the Middle District of Pennsylvania ("District Court") is set forth in petitioners' Appendix, A48-105. The District Court opinion has not been officially reported; however, it is reported as *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., et al.*, 1992-2 Trade Cases (CCH) ¶69,937 (M.D. Pa. 1992).

STATEMENT OF THE CASE

Petitioners, two of the original four defendants in this antitrust action, seek review of a unanimous panel decision of the Court of Appeals.[2] The Third Circuit applied the type of fact-intensive analysis of competitive effects in a summary judgment context that this Court recently endorsed in *Eastman Kodak Co. v. Image Technical Services, Inc.*, ___U.S. ___, 112 S. Ct. 2072 (1992), which clarified *Matsushita Electrical Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). The Third Circuit concluded, through its correct application of the established summary judgment standards, that the granting of summary judgment in favor of the two petitioners by the District Court was incorrect because genuine issues of material fact were present. The petition fails to raise any issues that warrant this Court's review of the Third Circuit's well-reasoned opinion. For these reasons, the petition does not justify the issuance of a writ of certiorari.

The central issue in this litigation in a summary judgment context is: what type of proof is necessary to find that rendering companies had an illegal agreement to allocate existing customers in the fat and bone rendering industry in violation

2. Petitioners did not petition for a rehearing or a suggestion for a rehearing en banc. *See* Fed. R. App. P. 40.

of Section 1 of the Sherman Act, 15 U.S.C. §1.[3] As set forth in more detail below, the petition commits these errors: (1) it fails to set forth any of the key material facts; it fails to state facts which the Court of Appeals found in the light most favorable to the nonmovant, the respondent; and ignores all disputed facts, contrary to summary judgment standards as set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Palmer v. BRG of Georgia, Inc.*, ___ U.S. ___, 111 S.Ct. 401 (1990); (2) it hypothesizes a nonexistent "conflict" between the case *sub judice* and *Matsushita* and *Monsanto*; and (3) it attempts to manufacture a "conflict" among Circuit Court decisions concerning the proper summary judgment standard in antitrust cases where none exists.

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3. It is extremely important to note at the outset that account allocation is the heart of respondent's claim. *See Petruzzi's*, 998 F.2d at 1228; A3. As the Court of Appeals stated:

> Before detailing the evidence put forward by Petruzzi's IGA, we pause to stress the nature of its allegations because it is important to keep it in mind when considering the evidence. Although Petruzzi's IGA alleges that the defendants' actions had an impact on prices, it does not contend that the defendants conspired to fix prices *per se*. Also Petruzzi's IGA's ultimate goal is not to prove that the defendants priced predatorily. Rather, it seeks to show only that the defendants conspired to allocate customers so that once a renderer had won or "loaded" an account, competition for that account effectively ceased.

Petruzzi's, 998 F.2d at 1233; A14.

The importance of respondent's allegations is manifest since petitioners stress throughout their petition that Petruzzi's claim was dependent upon allegations of "predatory pricing" (Pet. at 17) and "decisions as to basic price" (Pet. at 19 n. 9). This simply is not true. Petitioners' revisionist claims are merely a guise to formulate their theory of the case to fit petitioners' legal argument. The result of the customer allocation was low prices, but the core of respondent's conspiracy claim is one of customer allocation, a *per se* violation of 15 U.S.C. §1. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Topco Assoc. Inc.*, 405 U.S. 596 (1972); and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

The petitioners, in approximately one page of their petition, attempt to summarize the extensive record in this matter. However, this short cut approach to the facts in this case is highly selective, one-sided and misleading. The Court of Appeals presented a comprehensive analysis of these same facts in approximately twenty-four pages of its opinion. *See Petruzzi's*, 998 F.2d at 1228-29, 1233-36, 1241-46; A4-6, 14-22, 31-42, to which reference is respectfully made. To restate those facts would expand this brief by many pages. However, there were key areas of evidence which were recognized by the Court of Appeals, but which were conspicuously absent from the petition that are briefly summarized:

1. An admission of the conspiracy by one of the petitioners' (Moyer Packing) supervisory employees, Robert Sage. Sage told one of his solicitors, Howard Salisbury, on two separate occasions that ". . . *there was a mutual agreement and understanding with Darling, not to bother their accounts.*" (emphasis added). Salisbury reaffirmed this testimony by affidavit and upon cross-examination by petitioners' counsel. (*Petruzzi's*, 998 F.2d at 1233-34; A15-16);

2. A number of secretly recorded taped conversations between representatives of a non-conspirator company (Ryder Rendering) and one of the conspirators (Moyer Packing) in which the "rules" of the conspiracy and retaliation for failure to go along with the illegal agreement were clearly spelled out. (*Petruzzi's*, 998 F.2d at 1235-36; A18-21, 77-81. *See also* 998 F.2d at 1243, 45; A35-37, 40-41);

3. Discussions between petitioners' employees in which the illegal agreement was set forth. (*Petruzzi's*, 998 F.2d at 1234-35; A16-18);

4. *De minimus* competition between Moyer and Darling for petitioners' existing customers while actively competing for new accounts. (*Petruzzi's*, 998 F.2d at 1241-42; A32-33);

5. Awareness of petitioners' activities concerning

refraining from bidding on other renderers' existing accounts. (*Petruzzi's*, 998 F.2d at 1244; A37);

6. Petitioners' conscious parallel behavior coupled with plus factors which demonstrated actions contrary to petitioners' economic interests and motivation to enter into the illegal behavior. (*Petruzzi's*, 998 F.2d at 1242-46; A33-42);

7. *Unrebutted* expert testimony that there was collusive activity concerning existing accounts based upon a review of the record and an *independent*, multiple regression analysis by plaintiff's experts, based upon data supplied by defendants, that corroborated plaintiff's allegations of account allocation.[4] (*Petruzzi's*, 998 F.2d at 1236-37, 1241; A21-22, 31-32).

The Third Circuit merely followed the holding of this Court in *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 699 (1962), when it viewed the evidence in its entirety. For as the Third Circuit stated:

> Additionally, a court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a whole to see if together it supports an inference of concerted action. *Id.* at 1364 [citing to *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), *cert denied*, __U.S.__, 113 S. Ct. 1262 (1993)] (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410 (1962)); *In re Japanese Elec. Prods. Antitrust Litig*, 723 F.2d 238, 305 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

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4. The defendants in the District Court informed plaintiff's counsel that they decided not to submit any expert to rebut plaintiff's two experts, Drs. Adams and Asher. R 660-61. *See also Petruzzi's*, 998 F.2d at 1238; A24. As such, plaintiff's expert report must be considered in the light most favorable to the nonmoving party, the plaintiff. *Anderson*, 477 U.S. at 255.

Petruzzi's, 998 F.2d at 1230; A8.

As the Court of Appeals correctly observed, after reviewing the material facts and applying the applicable summary judgment standards:

> From this wealth of evidence, a reasonable jury could conclude that Moyer and Darling acted similarly both by refraining from competing on existing accounts and by retaliating against those renderers who went after their [petitioners'] accounts.
>
> * * *
>
> It [Petruzzi] has supplied evidence which indicates that Moyer and Darling had an actual agreement, and it has provided evidence that Moyer and Darling acted against their self-interest in ways not attributable to interdependence.

Petruzzi's, 998 F.2d at 1243, 1246; A37, 41-42. The record in this case fully supports those conclusions.

REASONS FOR DENYING THE WRIT

The writ should be denied because the decision of the Third Circuit is consistent with the decisions of this Court and other Circuits, and the petition does not present any issue warranting review by this Court. Petitioners real challenge is not to the legal standards applied by the Third Circuit. Rather, petitioners contest the Court of Appeals application of the facts to the legal standards, seeking to mischaracterize respondent's claim as one based upon "predation" and "pricing" as opposed to customer allocation. Simply put, petitioners seek certiorari on questions not presented by this case, but on their contorted factual and legal interpretations of the record and the law.

In resolving the issues actually presented by plaintiff's allegations, the Third Circuit's decision is faithful to this

Court's prior holdings in *Kodak*, *Matsushita* and *Monsanto* in the context of summary judgment in antitrust cases. In no respect does this case present questions of exceptional legal importance, for if it did, petitioners had the opportunity to request a rehearing en banc before the Third Circuit, a calculated decision which they chose not to exercise.[5] The decision accords as well with the decisions of other Circuits. Petitioners cannot seriously contend, based upon the extensive factual record below, that the Third Circuit, reviewing the evidence *de novo* and in favor of the nonmovant, the plaintiff herein, committed error that warrants review by this Court. No basis for certiorari has been presented.[6]

I. The Third Circuit Properly Applied The Summary Judgment Standard Enunciated In Kodak, Matsushita and Monsanto

Petitioners' argument is based largely on their own distorted interpretation of the summary judgment standard, not on reality. Contrary to the arguments raised by petitioners, no special or incremental burden attaches in antitrust cases, nor must the nonmovant in antitrust cases present only unambiguous evidence to survive summary judgment. Indeed, petitioners not only request that this Court apply their own

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5. Rule 35.1 of the Third Circuit Local Appellate Rules provides, in seeking a suggestion for rehearing en banc, that petitioning counsel make a statement that: "I express a belief based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the...Supreme Court of the United States...i.e., the panel's decision is contrary to the decision of...the Supreme Court in [citing specifically the case or cases]...." While there is no requirement that a party must seek a rehearing en banc before filing a petition for a writ of certiorari, the failure to do so certainly undermines petitioners' argument that the Third Circuit's decision is contrary to this Court's prior decisions.

6. Even if this Court were to give credence to petitioners' arguments, the Third Circuit also reversed the grant of summary judgment on the independent basis of conscious parellelism. *Petruzzi's*, 998 F.2d at 1242-46; A33-42. Hence, if somehow this Court found any merit in the petition, respondent has overcome summary judgment by showing parallel behavior, with the necessary plus factors. Therefore, this presents another reason to deny the petition.

more stringent application of Supreme Court precedent, but they also severely misrepresent the standard applied by the Third Circuit. Thus, petitioners have raised no real issue that warrants the Court's review; rather, they simply skew both the actual standard and its application by the Third Circuit.

In *Kodak*, *supra*, this Court clarified the standard for the antitrust plaintiff opposing summary judgment. The Court stated:

> The Court's requirement in *Matsushita* that the plaintiff's claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the non-moving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Kodak, 112 S. Ct. at 2083. (emphasis in the original).

Petitioners attempt to distance the instant case from *Kodak*, arguing that unlike this case, *Kodak* involved a "tying" arrangement, with unambiguous evidence that the defendant had implemented a tie-in. Pet. at 6. Petitioners' argument is wholly without merit. This Court's decision in *Kodak* clearly extends to all antitrust cases. Indeed, there is no qualifying language to indicate an intention to limit the standard to the facts of that case.[7] Moreover, the standard, as explained in *Kodak*, is merely a recitation of the standard that has always

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7. The implausability of petitioners' argument that *Kodak* is limited to tie-in summary judgment standards is that this Court in *Kodak* reviewed *Matsushita*, a case involving a horizontal conspiracy to fix prices, in formulating the summary judgment standard in antitrust cases. *See Kodak*, 112 S. Ct. at 2083.

been on the nonmoving party at summary judgment: to create a reasonable inference of an illegal conspiracy, in light of any competing inferences of permissible conduct or, in other words, present evidence that tends to exclude the possibility of permissible conduct. *Matsushita*, 475 U.S. at 588 (citing *Monsanto*, 465 U.S. at 764; *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 280 (1968)). Thus, not only is *Kodak* applicable to all antitrust cases, but it simply clarifies the summary judgment standard.

Kodak is certainly not the sole Supreme Court precedent relied upon by the Third Circuit. As recognized, this Court in *Matsushita* instructed as to the relevance of a plausible motive to engage in the conduct charged:

> Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.... On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price preditorily for two decades despite the absence of any apparent motive to do so.

Matsushita, 475 U.S. at 596-97 (citations omitted). Additionally, this Court observed that, even with a plausible motive, purely ambiguous evidence, or evidence as consistent with permissable conduct as with illegal conspiracy, standing alone, will not overcome summary judgment. *Id.* at 597 n.21.

Thus, under this Court's standard, in the absence of a plausible motive, a court should restrict the range of permissible inferences and look to "sufficiently unambiguous" evidence to determine whether a genuine issue of material fact still exists. Logically then, the existence of a rational motive allows for a more expansive range of inferences, including evidence subject to ambiguity, as long as this

evidence is not "purely ambiguous". *Id.*; *Petruzzi's*, 998 F.2d at 1233; A13-14. By no means did *Matsushita* prohibit the consideration of ambiguous evidence; rather, the Court limited the range of inferences which may be drawn, depending on the existence of a plausible motive.[8]

Contrary to petitioners' argument that under the Third Circuit's application of the standard it need only find evidence that was as consistent with an illegal conspiracy as permissible conduct, it is obvious that the Court of Appeals was careful to apply the teachings of *Kodak*, *Matsushita* and *Monsanto*.[9] *Petruzzi's*, 998 F.2d at 1230-33; A9-14.

The Court of Appeals recognized that while a defendant is not entitled to summary judgment simply because it demonstrated a plausible rationale for its behavior, the focus must remain on evidence proffered by the plaintiff and whether that evidence "tends to exclude the possibility that [the defendants] were acting independently." *Id.* at 1232; A11 (quoting *Monsanto*, 465 U.S. at 764). The Third Circuit was conscientious and careful to meet the concern in *Matsushita*, that if it allowed mistaken inferences to be drawn, it would chill procompetitive behavior. After finding that in stark contrast to *Matsushita*, the plaintiff's conspiracy theory in the case *sub judice* was ". . . not implausible, in fact, it [made]

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8. In *Monsanto*, this Court did not *exclude* all "ambiguous" evidence in its application of the summary judgment standard. In fact, this Court expressly determined that ambiguous evidence, in the form of a newsletter from one of the distributors to his dealer-customers, produced a reasonable inference of an antitrust violation. *Monsanto*, 465 U.S. at 765-66.

9. Petitioners have grossly misrepresented the Third Circuit opinion by quoting *one* sentence relating to *one* piece of evidence, the comparison of pricing between new and existing accounts, and contending that this represents the standard applied for summary judgment. Pet. at 4. The Court of Appeals was merely explaining the significance of defendants' pricing scheme to plaintiff's theory of account allocation. By no means did this language delineate the standard applied for summary judgment. In fact, the language quoted is entirely unrelated to the standard applied by the Third Circuit, evidencing petitioners endeavor to cloud the real issues before this Court. The appropriate standard was set forth at length by the Court of Appeals. *Petruzzi's*, 998 F.2d at 1230-33; A9-14.

perfect economic sense." (*Petruzzi's*, 998 F.2d at 1232; A12), the Third Circuit did not simply proceed to draw inferences from the evidence without caution. The Court of Appeals appropriately concluded:

> [G]iven the circumstances of this case, more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present.

Id. at 1232; A13.

Furthermore, the Third Circuit did not merely take inferences of an illegal activity unrestricted. In deciding that plaintiff had met its burden, the Appeals Court weighed all of the evidence and determined that the expert study, "in conjunction with the testimony of Salisbury and Ebersole and the Ryder tapes 'tends to exclude the possibility' that the market as it exists came about as the result of independent action." *Id.* at 1241; A31-32. The Third Circuit also found that while the inference of few accounts transferred among the defendants was not enough to prove the existence of a conspiracy, when considered in conjunction with the other evidence, it made "an inference of concerted action more reasonable." *Id.* at 1242; A33.

The Third Circuit properly applied the lessons of *Kodak*, *Matsushita* and *Monsanto*, finding that the inference of conspiracy was reasonable in light of any competing inference of permissible conduct. Hence, the Court of Appeals determined that it was *not* as consistent that defendants acted permissably as it was that they conspired illegally.[10] No other Circuit instructs differently.

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10. The Third Circuit excluded other evidence submitted by respondent, including information of social contacts and telephone calls among representatives of the defendants, demonstrating the Court of Appeals' cautious approach to purely ambiguous evidence or evidence that may be as consistent with permissable conduct as an illegal conspiracy. *Petruzzi's*, 998 F.2d at 1242, n.15; A33. Given this ruling by the Third Circuit, petitioners' misrepresentation of the standard applied at the appellate level looms even larger.

Petitioners request that this Court ignore the applicable summary judgment standard, and apply their own, more stringent interpretation of *Matsushita* and *Monsanto*. Petitioners argue that "*Matsushita* requires plaintiff to proffer *unambiguous* evidence tending to exclude the possibility that defendants would act as they do in the absence of a conspiracy, not merely evidence that is as consistent with plaintiff's conspiracy theory." Pet. at 7 (emphasis in the original). Simply put, this is not the standard.

While respondent has put forth unambiguous evidence of an illegal conspiracy supported by unrebutted expert testimony, the Court need not consider only the "unambiguous". As set forth above, this Court did not instruct that all evidence subject to ambiguity be precluded from summary judgment review. Instead, this Court merely circumscribed the range of permissible inferences that may be drawn from ambiguous evidence. Obviously, if the Supreme Court took the time to instruct as to the "range of permissible conclusions that might be drawn from ambiguous evidence...." (*Matsushita*, 475 U.S. at 596-97), it did not proscribe the use of *all* evidence subject to ambiguity.[11]

Hence, the petitioners misrepresented the actual standard applied by the Third Circuit, and purposely distorted the standard enunciated by the Supreme Court in an attempt to find fault with the conclusions drawn by the Third Circuit.

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11. Were this Court to apply petitioners' distorted interpretation of the standard, it would serve as both a shield and sword for any defendant in an antitrust case. By considering only the "unambiguous" evidence, defendants would be shielded from any negative inference from evidence subject to ambiguity. Moreover, by enabling a defendant to slice away any "ambiguous" evidence, the standard would operate as a weapon to severely limit evidence that may support plaintiff's theory. Thus, the application of petitioners' standard serves to weigh all evidence subject to ambiguity in their favor, leaving no reasonable inferences to be drawn from evidence that supports a *per se* violation. Such an interpretation would effectively eliminate circumstantial evidence from summary judgment review, since virtually all circumstantial evidence is subject to some ambiguity. Obviously, application of such a standard would result in an erroneous ruling at the summary judgment stage.

For obvious reasons, petitioners have failed in their tactics and the petition should be denied.

II. In Order To Create An Issue That Warrants Review, Petitioners Attempt To Manufacture A Conflict Among The Circuits Where None Exists

The Third Circuit's opinion does not conflict with summary judgment standards of the other Courts of Appeal. Just as petitioners have distorted the standard for summary judgment by this Court, they attempt to fabricate a "conflict", as to the applicable standard for summary judgment by other Circuit Courts.

After careful consideration, the Third Circuit set forth, at length, the correct summary judgment standards. For example, it stated the appropriate criteria courts must consider in light of this Court's decisions in *Kodak*, *Matsushita* and *Monsanto*. *Petruzzi's*, 998 F.2d at 1230-32; A7-11. In fact, the Third Circuit stated:

> In this respect, then, *Matsushita* did not invent a new requirement for an antitrust plaintiff to meet, but merely articulated an established one, i.e., the inferences drawn from the proffered evidence must be reasonable. *See Eastman Kodak Co.*, ___ U.S.___, 112 S. Ct. at 2083.
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> * * *
>
> The [Supreme] Court emphasized that evidence which is equally consistent with legal and illegal conduct, standing alone, cannot support an inference of antitrust conspiracy. [citing *Matsushita*, 475 U.S. at 588].
>
> * * *
>
> Rather, the focus must remain on the evidence proffered by the plaintiff and whether that evidence tends to exclude the possibility that [the defendants] were acting independently. [citing *Monsanto*, 465 U.S. at 764].

Petruzzi's, 998 F.2d at 1230-32; A9-11.

As stated above, the Third Circuit properly applied the lessons of *Kodak*, *Matsushita* and *Monsanto* to conclude that summary judgment was improperly granted. *Petruzzi's*, 998 F.2d at 1241; A31-32. Additionally, the Court of Appeals was particular in its duty to meet the concern in *Matsushita*, that if it allowed mistaken inferences to be drawn from the evidence, it would risk the danger of chilling procompetitive behavior. *Id.* at 1232; A11-12. Further, the Third Circuit excluded from its review evidence of phone conversations and social contacts, determining that this evidence was as consistent with permissible conduct as an illegal conspiracy. *Id.* at 1242, n.15; A33. No other Circuit Court applies the standard differently.

A review of the cases cited by petitioners clearly demonstrates that the Third Circuit is in agreement with other Circuit Courts in its interpretation of Supreme Court precedent that bears on the summary judgment standard. While petitioners have "cherry picked" cases where plaintiffs could not factually overcome summary judgment, the Third Circuit followed the same standard to find that this plaintiff had presented evidence that "tend[ed] to exclude the possibility" of independent action (*Id.* at 1241; A32), thereby precluding summary judgment. Thus, the cases cited by petitioners differ only as to the strength of evidence brought forth by plaintiffs, which resulted in a different outcome under the same standard applied in the instant case.[12]

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12. In *H.L. Hayden Co. & New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005 (2d Cir. 1989), the Second Circuit observed that summary judgment has been granted sparingly in antitrust cases, because the cases "so integrally involve motive and intent to conspire." *Id.* at 1012. However, the Court found summary judgment appropriate because the evidence was "at best" ambiguous, since it was "as consistent with permissable competition as with illegal conspiracy." *Id.* at 1016. Thus, the Second Circuit applied the same standard as the Third Circuit, albeit to a different result since plaintiff had not put forth sufficient evidence.

Similarly, in *Parkway Gallery Furniture Inc. v. Kittenger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989), the Fourth Circuit found

(Footnote continued on page 15)

In each case cited by petitioners, the nonmoving party failed to overcome summary judgment because the evidence put forth was as consistent with permissible conduct as an illegal conspiracy, or in other words, the evidence did not "tend to exclude the possibility" that defendants acted

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(Footnote continued from page 14)
that plaintiffs had not met their burden, since the evidence did not tend "to exclude the possibility that the alleged conspirators acted independently." Again, the standard used by the Third Circuit was applied, but plaintiff put forth purely ambiguous evidence. In the Court's view the evidence failed to present a genuine issue of material fact as to whether defendants acted independently. Hence, only the outcome, based upon the facts presented, is distinguishable from the Third Circuit opinion. *See In re Beef Industry Antitrust Litigation*, 907 F.2d 510 (5th Cir. 1990), (in addition to failing to show that defendant's actions were parallel, plaintiff's evidence pointed equally to permissable competition as it did on illegal conspiracy.); *See also, Nurse Midwifery Associates v. Hibbert*, 918 F.2d 605, 616 (6th Cir. 1990), *reh'g denied en banc*, 1991 U.S. App. LEXIS 498 (6th Cir. 1991), *cert. denied, Nurse Midwifery Associates v. Hendersonville Community Hospital*, ___U.S. ___, 112 S.Ct. 406 (1991) (applying the same standard and finding that plaintiff failed to meet its burden since the evidence was as consistent with permissible conduct as an illegal conspiracy); *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1174 (7th Cir. 1990) (applying Supreme Court standard to find that all the evidence was ambiguous, since it did not sufficiently refute the possibility that each defendant acted independently.); *H.J. Inc. v. IT&T*, 867 F.2d 1531, *reh'g denied*, 876 F.2d 59 (8th Cir. 1989) (plaintiff did not have evidence beyond a "metaphysical doubt"); *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 904 (9th Cir. 1987); (conduct as consistent with permissible behavior as an illegal conspiracy, is not enough to overcome summary judgment); *Gibson v. Greater Park City Company*, 818 F.2d 722, 724 (10th Cir. 1987) (plaintiff did not produce any evidence that "tend[ed] to exclude the possibility" of independent action); *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1580 (11th Cir. 1988) (plaintiff failed to produce evidence that "tend[ed] to exclude the possibility" of independent action"); *Apex Oil Co. v. DiMauro* , 822 F.2d 246 (2d Cir. 1987) *cert. denied sub. nom.*, 484 U.S. 977 (1987); *International Distribution Centers, Inc. v. Walsh Trucking Co. Inc.*, 812 F.2d 786 (2d Cir. 1987), *cert. denied*, 482 U.S. 915 (1987); *Consolidated Metal Products Inc. v. American Petroleum Institute*, 846 F.2d 284 (5th Cir. 1988); *Health Care Equalization Commission v. Iowa Medical Society*, 851 F.2d 1020 (8th Cir. 1988); *Key Financial Planning Corporation v. ITT Life Insurance Corporation*, 828 F.2d 635 (10th Cir. 1987); *Winn v. Edna Hibel Corporation*, 858 F.2d 1517, 1520 (11th Cir. 1988); *Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976 (9th Cir. 1988); *Souza v. Estate of Bishop*, 821 F.2d 1332 (9th Cir. 1987).

permissibly. In the case *sub judice*, under the *same* standards, the Third Circuit found that plaintiff's evidence *did* tend to exclude the possibility of permissible conduct. Therefore, the discrepancy is only in the outcome, not the standard applied. Consequently, since there is no "conflict", certiorari should be denied.

The application by the United States Court of Appeals for the Ninth Circuit of the Supreme Court standards is no different. In *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, ___ U.S. ___ 111 S. Ct. 2274 (1991), the Ninth Circuit correctly followed *Matsushita* and *Monsanto* to reach its conclusion:

> In summary, we conclude that where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior. Once the defendant has made such a showing, the plaintiff must come forward with other evidence that is *sufficiently unambiguous* and *tends to exclude the possibility* that defendant acted lawfully.

Id. at 440. (emphasis added). Clearly, the Ninth Circuit's standard operates to the same end as the other Circuits, and any reliance thereon by the Third Circuit is not reversible error.[13]

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13. Additionally, petitioners' undocumented soothsayer argument that the standard applied by the Third and Ninth Circuits: ". . . will encourage . . . frustrated business enterprises . . . [to] flee or fail in response [to these decisions]. . . ." is pure sophistry. Pet. at 10. This Court can take judicial notice that businesses have not fled and are still operating on both the east and west coasts.

Finally, assuming arguendo that there was a possible conflict among the Circuit Courts, such conflict, if any, was undoubtedly resolved by this Court's recent decision in *Kodak*. In fact, all of the cases cited by petitioners were decided *before* this Court's decision in *Kodak*. Thus, *Kodak* has put to rest any potential conflict as to the summary judgment standards.[14]

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14. Noteworthy, in *Kodak* this Court cited to the Third Circuit in support of its observation that *Matsushita* placed no additional burden for plaintiffs to overcome summary judgment in antitrust cases. *See Kodak*, 112 S.Ct. 2072, 2083, n.14 (citing *Arnold Pontiac GMC Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 (3d Cir. 1987)).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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